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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket 92-266
	)	
Rate Regulation	)	

REPLY TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION

King County, Washington; Austin, Texas;
Dayton, Ohio; Gillette, Wyoming;
Montgomery County, Maryland;
St. Louis, Missouri; and Wadsworth, Ohio

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WYOMING; MONTGOMERY COUNTY, MARYLAND;
ST. LOUIS, MISSOURI; AND WADSWORTH, OHIO
TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION

Summary

1. King County, Washington; Austin, Texas; Dayton, Ohio; Gillette, Wyoming; Montgomery County, Maryland; St. Louis, Missouri; and Wadsworth, Ohio ("Coalition") hereby reply to Oppositions to Petitions for Reconsideration filed by Advanced Communications, Inc. et al. ("ACI"), Cablevision Industries Corporation et al. ("Cablevision"), Continental Cablevision, Inc. ("Continental"), National Cable Television Association ("NCTA"), and Time Warner Entertainment Company, L.P. ("Time Warner").

2. The above Oppositions do not respond directly to most of the Coalition's claims. The industry does not show why operators alone should be allowed to initiate cost of service showings, nor how such a one-sided arrangement can satisfy Congress' desire to ensure that rates do not exceed reasonable levels. Industry statements also reveal that allowing operators to choose different regulatory approaches for different tiers

undermines the goals of the Cable Television Consumer Protection and Competition Act of 1992 ("Act"): it may lead to over-recovery by operators, and may encourage more cost of service filings. The industry fails to demonstrate that current benchmarks are too low and make no response to the Coalition's arguments that they should be reduced further. The industry filings also reveal the lack of logic in allowing costs to be passed through, as contemplated by the FCC rules, or in permitting additional costs to be added on to rates.

3. Rather than present evidence or reasoned responses to the Coalition, the cable industry misrepresents the Coalition's position and then (in some cases) responds to that. For example, several filings assert that the Coalition supports cost of service regulation as the primary method. The Coalition has always supported a cost-based benchmark approach as the primary regulatory method. Some operators concur that actual costs must be taken into account in setting rates.

4. The Coalition asks the FCC to clarify its position regarding rate agreements. The Coalition believes that rate agreements should be considered to be valid and enforceable contracts, subject to challenge by interested parties, including subscribers. However, the Coalition fears that rate agreements may be used as a way to evade rate regulation (or rate reductions) altogether. The FCC should make clear that rate agreements cannot be used to avoid the subscriber benefits Congress intended to provide.

5. The Coalition believes that the cable industry has offered no substantive response to the Coalition's request that the FCC reconsider its decision to preempt existing programming service requirements, and to reconsider aspects of its decisions regarding how to determine whether effective competition exists.

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King County, Washington; Austin, Texas; Dayton, Ohio; Gillette, Wyoming; Montgomery County, Maryland; St. Louis, Missouri; and Wadsworth, Ohio ("Coalition") hereby reply to Oppositions to Petitions for Reconsideration filed by Advanced Communications, Inc. et al. ("ACI"), Cablevision Industries Corporation et al. ("Cablevision"), Continental Cablevision, Inc. ("Continental"), National Cable Television Association ("NCTA"), and Time Warner Entertainment Company, L.P. ("Time Warner"). Rather than repeat arguments already made, this Reply will respond to the industry's mischaracterizations of the Coalition's position, and point outparticular weaknesses with some of the industry's claims.

I. THE INDUSTRY HAS NOT RESPONDED SUBSTANTIVELY TO THE COALITION'S OBJECTIONS TO THE FCC'S REGULATORY SYSTEM

The Oppositions filed by industry representatives do not respond to the Coalition's claims that (1) a cost-based benchmark system must be implemented in the long run, and (2) a fair, two-sided use of cost of service proceedings is necessary to protect consumers and to effectuate congressional goals. Rather than object directly to the Coalition's positions, the industry mischaracterizes them. The industry likewise misrepresents the Coalition's objections to the FCC's benchmark system. But the industry has not presented convincing arguments to counter the Coalition's claims. In fact, some of the filings by industry representatives support the Coalition's positions. For instance, they concede that a cost-based regulatory approach is necessary to satisfy the Cable Television Consumer Protection and Competition Act of 1992 ("Act") (See ACI Opp. at 5), and recognize that adding costs to a price-based regulatory system makes no sense (See Time Warner Opp. at 3).

A. The Coalition Supports a Cost-Based Benchmark System as the Primary Regulatory Method

Several industry filings assert that the Coalition wants the Federal Communications Commission ("FCC" or "Commission") to adopt a cost of service method as the primary or exclusive method of regulation. See e.g., Cablevision Opp. at 7; NCTA Opp. at 3. The Coalition's position has always been clear and consistent: it advocates a benchmark system as the primary method of regulation, but believes that ultimately that benchmark system must be cost-based if it is to present a method of regulation that will be viable over the long term.[1]

[1]Most of the Coalition members participated in the initial round of this proceeding. See Comments and Reply Comments of Austin, Texas, et al. In the initial round, the Coalition members provided a model for a cost-based benchmark system.

The Coalition believes that a cost-based system will significantly reduce the need for cost of service proceedings. If the benchmark accurately reflects a particular system's true costs of providing service, the system will have little need or incentive to make a cost of service showing; the benchmark rate will allow the operator to recover its costs plus a reasonable profit. The industry is concerned, for example, that an operator that upgrades or rebuilds its cable system will not be adequately compensated for its improvements, under the FCC's current benchmark system. While the Coalition disputes that this is true (see discussion, infra), a cost-based benchmark system would reduce the need for operators to make a full cost of service showing to prove that its upgrade costs justify a rate above the benchmark.

The need for a cost-based regulatory system is supported by the cable industry. For example, ACI criticizes the FCC's rate regulations because "they were adopted without any considered study or analysis of the economics of the cable industry and the costs involved in providing the multitude of cable services today." ACI Opp. at 2. ACI further states that, "the benchmark rates are contrary to the 1992 Cable Act because they fail to take into account the cost of providing service ...." Id. at 5. While ACI's criticisms are misplaced for the short-term, as members of the Coalition have pointed out, longer term costs and revenues must be incorporated in the benchmark, using the sort of system proposed by the Coalition.[2]

B. The FCC's Regulatory System <u>Needs to Reduce Rates Further</u>

NCTA asserts that parties that have sought strict regulation of cable rates "appear to be largely satisfied with the Commission's benchmarks insofar as they require rather drastic reductions in cable rates." <u>See</u> NCTA Opp. at 6. Nothing could be further from the truth. The Coalition has made clear that significantly greater rate reductions are needed in order to comply with the statute. <u>See</u> Coalition Pet. for Recon. at 10 n.10. <u>See also</u> ACI Opp. at 4 (saying Coalition has asked the FCC to reduce benchmark rates further).

For reasons previously explained in its filings and in filings by others, the Coalition remains convinced that the FCC's benchmark system does not reduce rates sufficiently. The industry has presented no evidence to the contrary. While it makes repeated cries that regulated rates are so low they will drive operators out of business, it has thus far not shown that this is true. A filing by a group that "represent[s] more than 25% of the total cable television subscribers in the United States" admits that, so far, the industry's claims remain unproved. <u>See</u> Medium-Sized Operators Group Comments at 2. That

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[2]On the other hand, the FCC's recent suggestion that it might adopt a "cost-based" benchmark system in addition to existing benchmark system and then allow operators to choose the most favorable method for setting rates is objectionable and indeed would lead to higher rates.

filing states, "We recognize that some hard evidence needs to be developed to support some of these suggested changes." Id., attached "Comments Regarding Rate Regulation and Cost of Service Rules," at 2.

Studies and other evidence show that current cable rates need to be reduced 30 to 50 percent to eliminate monopoly profits, as mandated by the 1992 Act. The FCC's regulation reduce rates by less than 10 percent. See Coalition's Opp. at 9-10. The FCC is required to reduce rates to reasonable levels. It has not done so. If the industry is serious that the proposed rates, and further reductions, not only take away its monopoly profits, but actually fail to provide fair compensation, it was incumbent upon the industry to provide evidence that would prove its claims.

C. The Filings by the Industry Reaffirm the Lack of Logic in the FCC's Allowance of Other External Cost Pass Throughs

In its Petition for Reconsideration, the Coalition asserted that the FCC's underlying premise for permitting certain cost increases to be passed through -- namely that the costs are beyond an operator's control -- was flawed. The Coalition pointed out that operators negotiate with programmers for programming rates; they will negotiate with broadcasters regarding retransmission consent fees; they negotiate with franchising authorities regarding franchise fees, provision of access services, and other franchise requirements. Thus, these costs are hardly beyond the cable companies' control. The cable operators offer little response. They claim that because there is bargaining over such agreements, that proves that such costs are beyond the operators' control. See Time Warner Opp. at 16. But the fact that there is bargaining proves, to the contrary, that the costs are not unilateral burdens imposed on the operators.

The operators also appear to claim that all provisions contained in the franchise are involuntary, and beyond the operator's control, because an operator would be in breach if it failed to abide by a provision of the franchise. See e.g., Time Warner Opp. at 17. But such a conclusion turns the law of contracts on its head. The fact that an operator, having voluntarily agreed to a term or condition, is subsequently bound to comply with that term or condition hardly transforms a voluntary action into an involuntary one.[3] It certainly does not prove that the operator lacked control over the resulting transaction.

Statements by the industry also reveal that there is no rational basis for allowing automatic pass throughs of certain "external" costs. They admit that benchmarks already incorporate such costs. See Time Warner Opp. at 3 (admitting that the benchmarks represent an average of costs, and recognizing that

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[3]Thus, the obligation of a cable company to pay its chief executives millions of dollars in compensation is hardly an obligation beyond the operator's control merely because the obligation is set forth in a contract. The cable industry's theories, however, would lead to the conclusion that such payments are "external costs."

"[t]here is no basis for converting price measures into cost measures"); Cablevision Opp. at 3 n. 6 (conceding that benchmarks "indirectly" account for external costs). The FCC has likewise recognized that allowing costs to be added to rates derived by price-cap regulation may lead to double counting. Price Cap Regulation of AT&T, 66 R.R.2d 372, 432 (1989), on recon., 68 R.R.2d 1179 (1991), remanded in part on other grounds sub nom. American Tel. & Tel. Co. v. FCC, 974 F.2d 1351 (D.C. Cir. 1992).

Moreover, the additional costs that operators seek to have passed through may already have been incorporated into benchmark rates. For example, a study submitted by one operator shows that rates for systems used to establish the FCC's benchmarks tended to have been recently upgraded or rebuilt. See Viacom International, Inc.'s Petition for Reconsideration, RAND study (showing that, on average, overbuild systems -- whose rates were used to establish the benchmarks -- have greater channel capacity and are more likely to have been recently upgraded or rebuilt). Even older systems are likely to have included upgrade costs in their rates. For example, Continental asserts that it planned for a system upgrade in Dayton, Ohio for a period of about 5 years. See Continental Opp. at 16.

The Opposition filed by Continental demonstrates the ease with which external cost pass throughs may be abused. As the attached documents from the City of St. Paul explain, Continental has misrepresented what was in fact a reduction in service obligations, requested by Continental, to be an increase in service forced upon the operator. See Exhibit C. This sort of potential abuse demonstrates that the Commission cannot allow operators to justify increases based on a partial consideration of costs, without fully considering benefits obtained by the operator.

D. The Industry Opposition to the Coalition's Position Regarding Rates for Certain Types of Channels Is Based on Mischaracterizations

In its Petition for Reconsideration, the Coalition argued that (1) the Commission ought not to allow "pass-throughs" of programming costs under its benchmark system; and (2) that barker channels ought not to be counted in calculating the minimum rate an operator is permitted to charge under the benchmark. The industry's response is, essentially, that the position taken by the Coalition and others fails to recognize that programming costs vary from service to service. In fact the Coalition recognizes that programming costs may vary widely. For this reason, the Coalition supported pass-throughs of programming costs in a cost-based regulatory system, subject to protections. But simply adding on programming costs to the FCC's price-based benchmarks is not the answer. As one operator admits, "There is no basis for converting price measures into cost measures." See Time Warner Opp. at 3. See also Comments and Reply Comments of Austin, Texas, et al. Increased payments for programming may well be offset by increased revenues, in the form of additional subscribers and increased advertising revenues.[4]

For a similar reason, the Coalition objects to "barker" channels being included in the calculation of channels for purposes of determining appropriate rates under the FCC's price-based benchmark system. See Coalition Pet. for Recon. at 11. As explained, these channels advertise the operator's premium and pay-per-view services. They offer no benefit to subscribers who desire only tiered services. There is no justification for requiring those subscribers to pay for advertising of benefit to the operator; indeed, including the channels without some recognition of the benefit would appear to contradict explicit requirements of the Act.[5]

E. The Industry Has Not Demonstrated Why Regulators Should Not Be Allowed to Initiate Cost of Service Proceedings

While the Coalition believes a benchmark systems (ultimately based on costs) should be the primary means of regulating cable, it recognizes that cost of service proceedings may be necessary when the benchmarks do not result in a reasonable rate, either because that rate is too high or too low. But the cost of service option must be available in a way that is fair to

[4]It is unfair to consumers to recognize only the cost side of the equation, and no industry comments suggest otherwise.

[5]Some industry members assert that the Coalition seeks to exclude "menu" and directory services from the calculation of rates. See NCTA Opp. at 13. The Coalition did not make such an argument. However, the Coalition notes that operators should not be permitted to increase their rates by adding duplicative menu channels.

consumers and that promotes the goals of the Act. Not allowing franchising authorities and the FCC to initiate cost of service proceedings is contrary to public policy and to established regulatory principles.

The FCC acknowledges that its benchmarks are likely to be too high or too low in any given case. Time Warner claims that the FCC's per-channel benchmark rates could be wrong by as much as 25 percent in either direction. See Time Warner Pet. for Recon. at 4. Time Warner further alleges that the benchmarks are "so fundamentally flawed" that they are virtually useless. See Time Warner Opp. at 2. See also ACI Opp. at 5 n. 2 (Commission should not use its flawed data as basis for regulation). The 1992 Act requires the FCC to establish regulations that ensure that subscribers are not forced to pay supra-competitive rates. Forcing regulators to apply a system that -- even the industry concedes -- permits many operators to charge rates above competitive levels violates the mandate of the Act. Permitting operators (but not regulators) an opportunity to justify a rate different from the benchmark rate compounds the violation of congressional intent. Such a one-sided system virtually guarantees that rates will be too high in many communities. Where the benchmark allows a rate that is too high, operators will charge that rate. Where the benchmark is too low (or where operators can allocate costs to a system sufficient to justify a rate above the benchmark), they will initiate a cost of service proceeding.

Ensuring that high-cost operators at least obtain a reasonable return, while allowing low-cost operators to retain excessive profits, contradicts established precedent. A similarly asymmetrical scheme was struck down in American Tel. & Tel. Co. v. FCC, 836 F.2d 1386, 1391-92 (D.C. Cir. 1988). Cf. New England Tel. & Tel. Co. v. FCC, 826 F.2d 1101, 1108-09 (D.C. Cir. 1987), cert. denied, 490 U.S. 1039 (1989). NCTA's claim that consumers have no right to show that rates are too high is simply wrong. See NCTA Opp. at 12. Congress has established a system that gives consumers a right to receive service for reasonable rates; therefore, a regulatory system that tilts the balance against consumers and knowingly permits regulated monopolists to charge unreasonably high rates constitutes a violation of consumers' rights under the statute and the Constitution. Federal Power Com'n v. Hope Natural Gas Co., 320 U.S. 591 (1944).

Some industry representatives claim that franchising authorities would abuse the right to present cost of service showings. See e.g., Time Warner Opp. at 10. This speculative claim can hardly justify allowing operators to overcharge consumers. In the first place, even if one assumed a particular local government wished to abuse the rate process, it is not clear how that could be accomplished. The decisions of the franchising authority must be made in accordance with FCC deadlines, so delay is not a serious issue. The final decision is subject to FCC review and correction. Nor is it rational to assume that communities, whose budgets are dwarfed in many cases by the budgets of cable operators, would engage in expensive proceedings to force unreasonable settlements. More importantly, local governments have no incentive to force an operator to charge rates so low that it could not remain in business over a long period of time. If the benchmark represents a reasonable rate, a franchising authority has no reason to want to force the operator to charge less than that rate, and the operator has no incentive to agree to a lower rate. However, if the benchmark permits the operator to charge an unreasonably high rate, the operator is not harmed by the "threat" that it will be forced to justify its rate based on cost unless it agrees to reduce the rate. In fact, this is precisely the type of rate agreement operators ask the FCC to permit. For example, Time Warner urges the FCC specifically to allow franchising authorities to permit an operator to charge rate above the benchmark without undergoing a cost of service showing. <u>See</u> Time Warner Opp. at 7.[6]

Perhaps most importantly, the FCC should recognize that operators are clearly using this unbalanced scheme to attempt to force communities to accept unregulated rates. <u>See</u> Cable Florida's proposed rate agreement, Exhibit A. Maintaining this scheme in the face of these abuses cannot be justified.

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[6]There is no reason the converse should not be allowed as well. Franchising authorities should have the right to initiate cost of service proceedings, and the operator should be able to agree to a below-benchmark rate in lieu of having to go through a cost of service proceeding which might result in an even lower rate.

II. OPERATORS SHOULD BE REQUIRED TO CHOOSE ONE REGULATORY METHOD FOR ALL TIERS OF SERVICE

Operators should be required to choose one method of regulation -- either benchmark or cost of service -- for all service tiers. This is particularly true if the FCC continues to refuse to allow regulators to initiate cost of service proceedings. As the industry acknowledges, the benchmarks may be too high in some cases. The industry also admits that one tier may be more costly to provide than another, and an operator may wish to make a cost of service showing for that tier alone. See Time Warner Opp. at 14. Rather than a justification for allowing different regulatory approaches, this shows why a single regulatory approach is necessary to comply with Congress' intent to ensure that all regulated service tiers do not exceed reasonable rate levels. Continental claims that Congress only cared that basic rates be capped at reasonable levels. See Continental Opp. at 3. But the plain face of the statute shows that Congress also wanted to ensure that subscribers were not forced to pay too much for cable programming services. 47 U.S.C. § 543(c). If the operators are allowed to "pick and choose" the regulatory method by tier, operators will be in a position to maximize rates, without any assurance that the overall rates are reasonable.

Some industry representatives assert that requiring the same regulatory method would be unduly burdensome, and would greatly increase the number of cost of service proceedings. See e.g., ACI Opp. at 12. Others claim that, to reduce administrative burdens, the FCC should conduct both cost of service proceedings where an operator wishes to make cost showings for both basic and non-basic rates. See NCTA Opp. at 15. The industry overestimates the administrative difficulties. The FCC could require the franchising authority to transmit its cost of service records for the FCC to use, thereby reducing duplication of work and enhancing consistency. Moreover, it is far from clear that requiring operators to show that, overall, their costs for regulated services are not covered by benchmark rates would increase rather than decrease the number of cost of service showings.[7]

III. THE ACTIONS OF THE INDUSTRY MAKE IT ESSENTIAL THAT THE FCC CLARIFY ITS POSITION ON RATE AGREEMENTS, AND ALTER ITS REGULATIONS TO ENSURE THAT SUBSCRIBERS ARE ABLE TO OBTAIN FULL REFUNDS FOR ALL OVERCHARGES

1. Rate Agreement Should Be Enforceable.

The Coalition and the cable industry appear to agree, in principle, that operators and the franchising authority should be permitted to enter into rate agreements, as an alternative to the benchmark or cost of service regulation set forth in the FCC's rules. However, there is some discrepancy as to how those agreements should be reached, and what force they should have.

The Coalition believes that franchising authorities should have broad discretion to reach rate agreements, as long as there

[7]Certainly, if the Coalition is correct that, in general, benchmarks are too high and that the benchmarks will result in average rate reductions of far less than 10 percent, operators will be less likely to opt for a cost of service showing if they have to justify above-benchmark rates for all regulated tiers.

is public notice and opportunity to comment, as required by 47 U.S.C. § 543(b)(3)(C). The operator and franchising authority could even reach agreement regarding rates for cable programming services. Any interested party (including subscribers) could appeal an agreement to the FCC, but the FCC would be obligated to uphold the agreement, absent a clear contravention of public policy.[8] An agreement not to regulate would be unlawful as against public policy. Likewise, for example, an agreement that failed to provide compensatory rates to the operator would violate public policy. Or an agreement that effectively deprives subscribers of their right to rate refunds should not be sustained. See Proposed agreement between Cable Florida and Alachua County, ¶ 2, Exhibit A (requiring franchising authority to permit basic rates to increase by the same amount as any rate decrease resulting from a complaint regarding cable programming service rates). But unless struck down by the FCC or the courts, the agreements must constitute valid and binding contracts. Rate agreements that are terminable at will, as advocated by Continental (See Continental Opp. at 22), could unfairly harm

[8]The FCC could take the rate agreement into account, giving it a presumption of reasonableness, in evaluating rate complaints regarding cable programming services.

subscribers.[9] As the Coalition has pointed out, the approval is consistent with approaches in other regulated industries.

2. **The Regulations Should Be Altered to Ensure Subscribers Receive Full Refunds of Overcharges.**

The FCC should also change its rules in light of the massive efforts of the industry to discourage franchising authorities to delay regulation. The Coalition is aware that many cable operators are urging franchising authorities not to file for certification to regulate rates. The operators are claiming that (1) there is no deadline for certification filing; it can be done at any time; (2) there is no harm in delaying certification, and refunds will reach back to the effective date of the FCC's regulations or one year; and (3) informal, pre-certification rate agreements are valid and enforceable. See e.g., Letter from Joy E. Davison, TCI Cablevision of Eastern Shore to Kathy Mathias, Ocean City, Maryland, Exhibit B. The Coalition and others have pointed out that these representations are not accurate, and the industry has not rebutted this point.

The Coalition asks the FCC to modify its rules so that they reflect the industry's representations. In addition to affirming that rate agreements are valid and enforceable, the rules should be modified so that franchising authorities will not lose any rights by delaying certification. This can be done by clarifying

[9] In most cases, rate agreements will reflect an agreement that a certain package of facilities, equipment and services can be provided at a particular price. A community may well forego reasonable franchise requirements to keep rates low; if the operator can raise rates at will, consumers will lose the essential benefit of the bargain.

that, at the time a franchising authority files for certification, and the franchising authority (or the FCC) become authorized to regulate rates, the rate that will serve as the basis for companying the appropriate rate under FCC rules will be the rate the operators was charging on September 1, 1993, when the FCC rules became effective. If franchising authorities delay filing for certification, operators now below the benchmark might be able to raise rates to or above the benchmark before regulation begins without justification; under the FCC's current system, it is not clear these increases would be remediable.[10]

IV. FRANCHISE AGREEMENTS REGARDING PROVISION OF SERVICE ON THE BASIC TIER SHOULD NOT BE PREEMPTED

Some operators object to the Coalition's claim that preexisting (or future) agreements regarding provision of services on the basic tier are not preempted by the Act. However, such agreements do not conflict with the requirements of the Act. 47 U.S.C. § 543(b)(7) sets out "minimum" contents that must be included on basic tiers. Agreements that require additional services are not inconsistent, as long as they do not prevent inclusion of these minimum requirements. The Act does not expressly preempt existing service agreements. To the

[10]In addition, operators are now engaged in retiering services in ways that in many cases threaten to raise rates to the majority of subscribers. If the retiering is in fact revenue neutral, it should not change the per channel rate the operator compares to the benchmark. But, in many cases, operators may be abusing the FCC's rules. Therefore, to protect consumers, franchising authorities should be able to use either the per-channel rate as of September 1, 1993, or April 5, 1993 in evaluating the operator's benchmark comparisons.

contrary, it retained provisions that acknowledge, and approve enforcement of, such agreements. See Coalition Pet. for Recon. at 22-23. It is a well established construct of legislative interpretation that, wherever possible, a statute must be read to give meaning to all provisions, and should not be read to render one part superfluous or inconsistent. See e.g., United States v. Nordic Village, Inc., 112 S.Ct. 1011, 1015 (1992).

The operators assert that such service agreements are inconsistent with the Act, which gives operators sole discretion to add services to the basic tier. See Time Warner Opp. at 25-26; Cablevision Opp. at 10. But the Coalition seeks to enforce provisions to which the operators have agreed. The service obligations are contained in franchise agreements which were reached as a result of bilateral negotiation. They represent an exercise of discretion by the operator. They are not unilaterally imposed upon an operator. The change in law provides no reasonable basis for negating those agreements.[11]

In addition, some industry members claim that permitting service agreements to remain in force could effectively give franchising authorities control over all satellite-delivered services. See e.g., Continental Opp. at 6. The industry claims that this conflicts with the Act, which evinces a desire to have the FCC control satellite-delivered programming. But the

[11] By analogy, if a tenant agreed to mow the lawn as part of rent, that would constitute a binding obligation, even though it requires the tenant to do something he would not otherwise be required to do. But the agreement hardly makes the tenant's obligations "involuntary."

argument loses all weight in light of the fact that, according to the industry, the Act gives operators the right to do just that, namely, place as much programming as it wishes on basic tiers, which are regulated primarily by franchising authorities. If Congress were really concerned that local governments not have regulatory control over satellite-delivered services, (1) it would not have expressly permitted operators to place that programming on basic tiers, and (2) it would have explicitly preempted service agreements that might require satellite services to be offered on basic tiers. Congress did neither of those things.

V. THE FCC SHOULD RECONSIDER ASPECTS OF ITS "EFFECTIVE COMPETITION DETERMINATION

A. The FCC Should Look Only at the Area Served in Determining Whether There Is less than 30 Percent Penetration

The Coalition asked the FCC to make it clear that the penetration calculation performed for determining whether an operator faces effective competition is based on the percentage of homes in the area actually served by the operator, rather than the number of homes in the geographic area the operator is entitled to serve. Operators respond that such an interpretation would violate "the express language of the 1992 Cable Act." See Time Warner Opp. at 19. See also Cablevision Opp. at 12 (claiming the statute's language "is explicit"). But "franchise area" is not defined by the Act. So to give it the interpretation urged by the Coalition hardly violates any "express" or "explicit" provision. Time Warner claims that the